

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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October 16, 2000

Jean Gibbons
Project Manager
Innkeeper Associates
Development Company, Inc.
690 Market Street, Suite 820
San Francisco, CA 94104

Re: Public Works Case No. 2000-016
Vineyard Creek Hotel and Conference Center
Redevelopment Agency, City of Santa Rosa

Dear Ms. Gibbons:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the entire Vineyard Creek Hotel and Conference Center ("Project") is a public work subject to the payment of prevailing wages.

The proposed Project is a redevelopment project in Santa Rosa involving the construction of a first-class, full-service, 155-room hotel and related amenities such as a spa and restaurant ("Hotel"), conference center with banquet facilities and parking ("Conference Center") and other related on-site and off-site improvements. The developer of the Project is Vineyard Creek Development, LLC ("Developer"). The City of Santa Rosa Redevelopment Agency ("Agency") owns the land proposed to be developed ("Site") and already has spent \$6 million on Site acquisition and assembly, relocation, demolition, toxic remediation and street realignment activities.

Under the Amended and Restated Predevelopment Agreement and Agreement to Lease, the Form of Site Development Agreement, and the various leases between Agency and Developer (collectively "Agreement"), Agency will ground lease the Site to Developer for construction. The Agency has approval authority over the following aspects of the Project: concept drawings and architectural concept; designation of the architect, construction manager, building contractor and engineers; preliminary and final design and construction plans; material change orders; and operating agreements and plans. Developer has approval authority

Letter to Ms. Jean Gibbons
Re: Public Works Case No. 2000-016
October 16, 2000
Page 2

over discretionary change orders to the Conference Center proposed by the Agency, which in Developer's judgment adversely impact the design, timing or cost of construction, or the opening of the Hotel.

The Agency agrees to contribute \$6.5 million in bond proceeds towards the total cost of construction, which is estimated at \$28.1 million. The balance of the cost is being paid for through a combination of bank loan, mezzanine debt/equity and developer equity. The Agency contribution is earmarked for the cost of constructing the Conference Center and "other off-site and on-site public improvements, including any mitigation measures requiring street modifications." See Draft Supplemental Report Pursuant to Section 33433 of the California Community Redevelopment Law on the Proposed Amendments to the Predevelopment Agreement and Attachments Thereto by and between Redevelopment Agency of the City of Santa Rosa and Vineyard Creek Development, LLC, July ____, 2000 ("Section 3343 Report"), p. 3. Upon completion of the Project, the Innkeeper Associates Development Co., Inc., a managing member of Developer, will operate and manage both the publicly-owned Conference Center, which is leased back to Developer, and the privately-owned Hotel.

Under the Agreement, Developer will pay base and participation rent¹, but will also have an option to purchase. The period of the lease is 55 years (with two ten-year options to extend) or until the purchase option is exercised. The purchase price for the Site is \$3.2 million, subject to adjustment; the purchase price for the Conference Center is \$6.5 million. Upon sale or refinancing by Developer, a percentage of the sale price in excess of \$27.5 million will be paid to the Agency as "Agency participation" in the Project. Section 33443 Report, p. 4.

The payment of prevailing wages is required on a public work, defined as follows: "Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds" Lab. Code § 1720(a). The above facts demonstrate that the Project is construction done under contract and paid for in part out of public funds.

Agency and Developer argue, however, that the manner in which the Project is structured obviates the requirement to pay prevailing

¹ When total gross revenues ("TGR") equal or exceed \$10 million, participation rent commences at 4 percent TGR per year. Base rent is due every year thereafter at \$100,000 per year (subject to adjustment), credited toward participation rent.

Letter to Ms. Jean Gibbons
Re: Public Works Case No. 2000-016
October 16, 2000
Page 3

wages on the Hotel portion of the Project because construction of the Hotel is not being paid for out of public funds. They assert that the Agency contribution of \$6.5 million is maintained separately from the private funds and applies only towards construction of the admitted public work, the Conference Center.² Underlying Agency's and Developer's argument is the proposition that the Project is actually two separate projects, one for the construction of the Hotel and one for the construction of the Conference Center. For the reasons set forth below, I find that the construction of the Hotel and Conference Center is a single interdependent and integrated public work requiring the payment of prevailing wages to all workers on the Project.

The determination whether a construction undertaking is one project or a series of separate projects must be done on a case-by-case basis. Nevertheless, a variety of factors must be considered, including: (1) the manner in which the construction is organized in view of, for example, bids, construction contracts and workforce; (2) the physical layout of the project; (3) the oversight, direction and supervision of the work; (4) the financing and administration of the construction funds; and, (5) the general interrelationship of the various aspects of the construction. A finding that a construction undertaking is either a single project or a series of separate projects is relevant in determining the extent to which prevailing wage obligations apply. In making this finding, it is the analysis of the above factors, not the labels assigned to the various parts of the project by the parties, which control. Under Labor Code section 1720(a), if there is a single project involving the payment of public funds, prevailing wages will apply to the entire project; if there are multiple projects, prevailing wages may apply to one project but not another, depending on the circumstances.

Turning to the facts of this case, the most compelling support in favor of a finding of a single project based on the first two factors - the manner in which the construction is organized and

² Developer also contends that the division between "public" and "private" parts of the Project is reflected in the separate legal descriptions of the real property parcels. The legal descriptions, however, do show areas of overlap between the Hotel and Conference Center parcels.

Letter to Ms. Jean Gibbons
Re: Public Works Case No. 2000-016
October 16, 2000
Page 4

its physical layout - can be found in the Resolutions of the City Council and Agency:

The Council finds and determines that the publicly-owned improvements to be constructed by the Redeveloper as part of the Hotel-Conference Center Project . . . are so interwoven with the Redeveloper's improvements to the Hotel Parcel in terms of design and construction that it is not feasible or practical from a design, architectural, engineering, construction or cost standpoint to design and construct the Hotel and Public Improvements as separate construction projects by public bid, and that the construction of said elements in an integrated and coordinated manner by the Redeveloper as provided hereunder is the only feasible means of achieving such construction This finding is based upon the fact that the Hotel-Conference Center Project has been designed as an integral whole Resolution 24493 of the Santa Rosa City Council, adopted July 14, 2000, § 4; Resolution 1470 of the Santa Rosa Redevelopment Agency, adopted July 14, 2000, §4. See also Amended and Restated Predevelopment Agreement and Agreement to Lease, June 30, 2000 draft, Recital F, p. 3.

With regard to the third factor, the Agency has extensive approval authority over significant aspects of the entire Project, including the Hotel. Developer also has approval authority over discretionary change orders³ proposed by the Agency to the Conference Center. As agreed between the parties, the "Agency acknowledges that due to the physical and economic integration of the Hotel and the Public Improvements, a discretionary Change Order desired by the Agency under subsection 6., above, may impact the course and cost of construction of the Hotel, as well as that of the Public Improvements. . . . The Redeveloper may disapprove any such proposed Change Order which, in the good faith judgment of the Redeveloper, adversely impacts

³ Defined as those "necessitated by Agency requested additions and upgrades, including equipment and fixtures, to any Element of Public Construction." Form of Site Development Agreement, June 30, 2000 draft, § VII, 8.02(6), p. 18.

Letter to Ms. Jean Gibbons
Re: Public Works Case No. 2000-016
October 16, 2000
Page 5

the design or timing of construction or opening of the Hotel or which increases the cost of construction " Form of Site Development Agreement, June 30, 2000 draft, § VII, 8.02(8), p. 18. Accordingly, analysis of this factor weighs in favor of a finding of a single project.

Concerning the fourth factor, the financing and administration of the construction funds, the Agency's \$6.5 million contribution is deposited with the private construction lender into a special account, to be held and disbursed for payments towards the construction of the Conference Center and other on-site and off-site public improvements. The Agency and Developer represent that the financial arrangement is carefully structured to prevent the disbursement of public funds on the construction of the Hotel. While this may be true, the Agency already has spent \$6 million on Site acquisition and assembly, including toxic remediation. The Agency's contribution of \$6.5 million toward the cost of construction is earmarked for other on-site and off-site improvements as well as for the Conference Center. The Hotel construction effort draws a distinct advantage from the expenditure of public funds on common improvements.

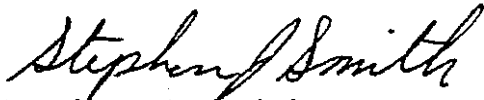
As to the last factor regarding the interrelationship of the various aspects of the construction, the Developer and Agency share a financial stake in the success of the entire Project. The Agency's participation rent is based on a percentage of the total gross revenue of the Hotel and Conference Center. Also, upon sale or refinancing, the Developer must pay the Agency a percentage of the sale price over \$27.5 million.

Further, but for the Agency's contribution of \$6.5 million, it would appear that the Hotel could not in fact be built. The Reuse Valuation prepared for the Agency by Keyser Marston Associates, Inc., refers to a financing gap of \$6.5 million and concludes that the Project would not be feasible without public financial assistance. See Reuse Valuation, July 2000, p. 16-17. The same report cautions that "[i]n the event the anticipated amount of financing changes, the project's public assistance need may need to be reevaluated and adjusted." *Id.* at 20. The work of Keyser Marston indicates that the Agency's contribution of \$6.5 million is the amount needed to close the gap in order to make the entire Project feasible, including construction of the Hotel.

Letter to Ms. Jean Gibbons
Re: Public Works Case No. 2000-016
October 16, 2000
Page 6

In conclusion, based on analysis of the above factors, I find that the Vineyard Creek Hotel and Conference Center is a single, integrated construction project that is not severable into public and private parts. Consequently, as a public work, prevailing wages must be paid to all workers on the entire Project.

Sincerely,

A handwritten signature in cursive script that reads "Stephen J. Smith".

Stephen J. Smith
Director

cc: Daniel M. Curtin
Chief Deputy Director